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IN THE
COURT OF APPEALS OF INDIANA

ANIBAL SARAVIA,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0609-CR-796
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0506-FA-93972

June 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Anibal Saravia appeals his convictions and sentence for three counts of Class A felony child molesting and two counts of Class B felony sexual misconduct with a minor. We affirm in part, reverse in part, and remand.

Issues

Saravia raises three issues, which we restate as:

I. whether the trial court properly admitted Saravia's confession into evidence;

II. whether the trial court properly denied Saravia's motion for mistrial; and

III. whether the trial court properly sentenced Saravia to consecutive sentences.

Facts

On June 2, 2005, fourteen-year-old M.W. told her neighbor and family friend, Robin Morgan, that her step-father, Saravia, had been having sexual intercourse with her. Morgan reported M.W.'s allegations to the police. Early the next morning, Saravia was taken to the police station and verbally informed of his Miranda rights. Saravia then gave a videotaped statement to the police in which he admitted having sexual intercourse with M.W.

On June 6, 2005, Saravia was charged with three counts of Class A felony child molesting based on sexual intercourse that occurred in 2002, when M.W. was eleven, and one count of Class B felony sexual misconduct with a minor based on sexual intercourse that occurred in 2005, when M.W. was fourteen. On July 13, 2005, the charging

information was amended to include a second count of Class B felony sexual misconduct with a minor based on another allegation of sexual intercourse occurring in 2005.

Prior to trial, Saravia moved to suppress his statement to police. After a hearing, the trial court denied this motion. In July 2006, a jury found Saravia guilty as charged. At the August 2006 sentencing hearing, the trial court sentenced Saravia to twenty years on the Class A felony convictions and six years on the Class B felony convictions. The trial court ordered that two of the Class A felony sentences be served consecutively and that the remaining sentences be served concurrently for a total sentence of forty years. Saravia now appeals.

Analysis

I. Motion to Suppress

The decision to admit evidence is within the trial court's sound discretion. Cox v. State, 854 N.E.2d 1187, 1193 (Ind. Ct. App. 2006). Our standard of review of decisions on the admissibility of evidence is effectively the same whether the challenge is made by a pre-trial motion to suppress or by a trial objection. Id. We consider the evidence most favorable to the trial court's decision and any uncontradicted evidence to the contrary. Id. However, we also consider any uncontested evidence favorable to the defendant. Hirshey v. State, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006).

A. Missouri v. Seibert

Saravia first argues that the investigating officer improperly questioned him prior to Mirandizing him in violation of Missouri v. Seibert, 542 U.S. 600, 604-05, 124 S. Ct. 2601, 2606 (2004), in which the defendant was awakened at 3 a.m., taken to a police

station, left alone in an interview room for fifteen to twenty minutes, and questioned for thirty to forty minutes until she confessed. After a twenty-minute break, the interrogating officer turned on a tape recorder and Mirandized Siebert for the first time, at which point she again confessed. The Siebert court concluded, "Because the question-first tactic effectively threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible." Id. at 617, 124 S. Ct. at 2613.

Following Siebert, in Drummond v. State, 831 N.E.2d 781, 783 (Ind. Ct. App. 2005), we decided a case in which the investigating officer "spent two hours discussing the molestation charge arising from his conduct with his son before Officer Converse brought up T.G., which was the real reason he was interrogating Drummond." In Drummond, Officer Converse testified at trial he spoke to Drummond without the tape recorder "'to get to know him and to--my intention was that hopefully he would make some admissions--maybe even a confession as to what he did.'" Id. (citation omitted). Only after Officer Converse had elicited an incriminating statement from Drummond did he turn on the tape recorder and Mirandize Drummond. Id. at 783-84. We concluded, "This two-part interrogation appears to be exactly of the character that the Seibert court sought to avoid." Id. at 784.

Saravia points out that the investigating officer in this case was Officer Converse, the same officer who conducted the improper interrogation in Drummond. Saravia also points to Officer Converse's testimony at the suppression hearing in which he referred to

the Drummond decision and stated that he had "learned" and that "that was the last time" he did a preinterview. Tr. p. 25. Saravia contends that he must have been the subject of an improper preinterview because Drummond was not handed down until July 26, 2005, and he was questioned on June 3, 2005.

The evidence here, however, simply does not support the conclusion that an improper Siebert-type interrogation took place. First, Officer Converse did not testify that he was attempting to obtain a confession prior to Mirandizing Saravia as he did in Drummond. Instead, Officer Converse specifically testified that he had a conversation with the deputy prosecutor in July 2004 about preinterviews and the Drummond case. He also testified that he had not spoken with a suspect since the Drummond case without Mirandizing him or her. See Tr. p. 26.

Moreover, Saravia testified that, in the car on the way to the police station, Officer Converse only asked Saravia if he believed that he "had been playing with" M.W. Tr. p. 33. Saravia answered yes, and Officer Converse responded, "yes that stepfather's [sic] always did that." Id. Defense counsel then questioned Saravia, "when you got to the police station do you remember sitting in the room and talking to the detective for a long period of time?" Id. Saravia answered, "No I don't remember. I don't remember, been a long time." Id. This evidence simply does not establish that Officer Converse conducted the type of interrogation prohibited in Siebert.

This conclusion does not change even when we consider M.W.'s trial testimony in which she stated that when her younger brother observed Saravia on top of her, Saravia explained that "he was playing with me. . . ." Tr. p. 100. Saravia argues, "One can infer

Converse told Saravia in his pre-Drummond ploy that M.W. accused him of molesting her and that he told his son he was 'playing' with her." Appellant's Br. p. 16. He further argues, "The questioning he faced and his admission he had been playing with M.W. was designed to mislead Saravia into waiving his rights and giving a full taped confession." Id. This single question, vaguely worded as "playing with" M.W., does not amount to a "police strategy adapted to undermine the Miranda warnings." Seibert, 542 U.S. at 616, 124 S. Ct. at 2612. This is not a basis for suppressing Saravia's statement.

B. Interpreter

Saravia also argues that his confession should have been suppressed because he did not knowingly waive his Miranda rights. He basically contends that because Spanish is his first language and he was not advised of his rights in Spanish or offered an interpreter he did not knowingly and intelligently waive his rights. "Due to the various ways a person may be warned under Miranda, a claim that advisements were inadequate requires that the State prove the warnings were given with sufficient clarity." State v. Keller, 845 N.E.2d 154, 162 (Ind. Ct. App. 2006).

Thirty-one-year old Saravia is from Honduras. At the suppression hearing, Saravia testified that he had lived in the United States for twelve years and that he had learned English. One police officer testified that Saravia was not confused during the interview and that he did not ask for an interpreter or otherwise indicate that he did not speak English. Officer Converse testified that during the interview he had no problem understanding Saravia and that Saravia did not appear to have a problem understanding him. Officer Converse also testified that Saravia's American wife spoke fluent English

and that M.W. and Saravia's son also spoke fluent English. Further, although he stated that he could not read English, the transcript of the videotaped interview indicates that Officer Converse read him his rights. During the interview, Officer Converse explained:

> Q. Okay. Well Anibal, it's important that we talk.
>
> A. Right.
>
> Q. And straighten things out. I need to hear from you. I think that's very important. But I have to give you your rights and then we can talk. Okay.
>
> A. Right.
>
> Q. Okay. You have the right to remain silent. Anything you say can be used as evidence against you in court. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning. If you cannot afford a lawyer and you want one, one will be appointed to you by the court before any questioning. If you decide to answer the questions now without a lawyer present, you will still have the right to stop answering anytime. You also have the right to stop answering anytime until you talk to a lawyer. You know it's important that I hear from your side. Okay.
>
> A. Yeah.

Exhibits p. 17. This evidence shows that Saravia knowingly and intelligently waived his Miranda rights. The trial court properly denied his motion to suppress.

II. Motion for Mistrial

Saravia also argues that the trial court improperly denied his motion for mistrial. "A mistrial is an extreme remedy warranted only when no other curative measure will rectify the situation." Harris v. State, 824 N.E.2d 432, 439 (Ind. Ct. App. 2005). The granting of a mistrial is a determination within the trial court's discretion. Id. We will

reverse its decision only for an abuse of that discretion. Id. We give great deference to the trial court's decision because it is in the best position to gauge the circumstances and the probable impact of the event on the jury. Id. To prevail on appeal from the denial of a motion for mistrial, the defendant must establish that the questioned information or event was so prejudicial and inflammatory that he or she was placed in a position of grave peril to which he or she should not have been subjected. Id. The gravity of the peril is determined by considering the probable persuasive effect of the event on the jury's decision. Id.

At trial Morgan testified that one time when she was riding in a truck with Saravia and M.W., M.W. was sitting next to Saravia and "his hand was between [M.W.'s] legs." Tr. p. 148. On cross examination, defense counsel questioned Morgan:

> Q. Did you tell the police about his incident about the truck?
>
> A. Yes, I did.
>
> Q. Okay. So they would have a record of it, right?
>
> A. They should have.
>
> Q. Okay. And did you tell them that night?
>
> A. No, I didn't tell the police officer, I told Mr. Converse.
>
> Q. Okay. And so you told him that night or later on?
>
> A. No, they talked to me either the next day or a couple days after that at my job.
>
> Q. Okay. That's when you let them know, right?
>
> A. Yes, I did.

Tr. pp. 148-49. After Morgan testified, Officer Converse and another police officer testified. The next morning, Saravia moved for a mistrial because he had not received a copy of Morgan's statement to the police during discovery.

Even assuming that Saravia's objection was timely and that the prosecutor's actions were improper, Saravia was not placed in grave peril. There was overwhelming evidence against Saravia including M.W.'s trial testimony and Saravia's own videotaped confession. Based on the evidence against Saravia, the probable persuasive effect of the State's failure to disclose Morgan's statement to police and the resulting questioning of her regarding it likely had little effect on the jury's decision. The trial court did not abuse its discretion in denying Saravia's motion for mistrial.

III. Consecutive Sentences

Saravia finally argues that the trial court improperly sentenced him to consecutive sentences. We review a trial court's sentencing decision for an abuse of discretion.[1] Plummer v. State, 851 N.E.2d 387, 390 (Ind. Ct. App. 2006).

When sentencing Saravia, the trial court stated:

> The Court's going to find as mitigating that he does have a minimal criminal history. He does have one, two, three, four prior arrests, but all of those were no files or dismissals and they were for alcohol-related incidents so the Court believes his minimal criminal history is mitigating. The court also will find that imprisonment - - long-term imprisonment would impose a hardship on his dependants. And I agree with [the prosecutor], I think I can do some of these consecutive, so - -

[1] The 2005 amendments that changed the to the "presumptive" sentencing scheme to an "advisory" sentencing scheme did not change the rules regarding the imposition of consecutive sentences.

> because they were separate incidents and it wasn't an isolated incident.

Tr. p. 296. The court sentenced Saravia to twenty years on each of the three Class A felony convictions and to six years on each of the two Class B felony convictions. The trial court ordered two of the twenty-year sentences to be served consecutively and the remaining sentences to run concurrently for a total sentence of forty years.

Saravia argues that the trial court improperly ordered his sentences to run consecutively because it did not find that the aggravating circumstances outweighed the mitigating circumstances. The State responds, "The trial court properly considered the separate incidences of the crime to be an aggravator supporting consecutive sentences, even though the court found no aggravators when discussing sentence lengths." Appellee's Br. pp. 13-14.

Although the commission of separate and distinct acts may indeed be a valid aggravating circumstance, see Sanquenetti v. State, 727 N.E.2d 437, 443 (Ind. 2000), the State does not argue that, here, the aggravating circumstances outweighed the mitigating circumstances. Our supreme court has observed, "In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. The same aggravating circumstance may be used to both enhance a sentence and justify consecutive terms." Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000) (citation omitted). The Marcum court concluded, however, that "because the trial court found the aggravating and mitigating circumstances to be in balance, there is no basis on which to impose consecutive terms." Id.

Applying Marcum, we recently addressed the validity of the imposition of consecutive sentences in White v. State, 847 N.E.2d 1043 (Ind. Ct. App. 2006). We acknowledged that the trial court found aggravators that could have supported consecutive sentences if the court had entered a finding regarding the balancing of the aggravators and mitigators to support such an order.[2] White, 847 N.E.2d at 1046. We also acknowledged, "the trial court did not explicitly find the mitigators outweighed the aggravators when it sentenced White to reduced sentences." Id. Accordingly, we concluded:

> Because the trial court did not explain why the balancing of the aggravators and mitigators justified the imposition of consecutive minimal sentences, we are constrained to hold this trial court abused its discretion in ordering some of the sentences served consecutively when its implicit balancing of the aggravators and mitigators led it to impose sentences shorter than the presumptive.

Id. at 1047.

Likewise, in the absence of an explanation that the aggravating circumstances outweighed the mitigating circumstances where such cannot be presumed based on the minimum sentences that Saravia received, we conclude that the trial court abused its discretion in sentencing Saravia to consecutive sentences. We reverse and remand for the trial court to resentence Saravia in a manner that comports with Marcum and note that the

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[2] As in White, we do not intend to imply that a trial court can never order presumptive sentences, or even reduced sentences, served consecutively. "If a court finds the aggravators outweigh the mitigators such that consecutive sentences are appropriate, the court still may order presumptive or reduced sentences." White, 847 N.E.2d at 1046 n.5.

sentence imposed on remand could be the same sentence we reverse herein if the court supports its sentence with appropriate findings. See id.

Conclusion

The trial court properly admitted Saravia's statement to police and denied his motion for mistrial. The trial court abused its discretion in imposing consecutive sentences without clearly explaining that the aggravating circumstances outweighed the mitigating circumstances. We affirm in part, reverse in part, and remand.

Affirmed in part, reversed in part, and remanded.

NAJAM, J., and RILEY, J., concur.